The Most Important Government Contracts Related Decisions of 2018

Susan Warshaw Ebner
Stinson Leonard Street LLP

K-Con, Inc. v. Secretary of the Army, 908 F.3d 719 (Fed. Cir. 2018)

In K-Con, the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) addressed whether to incorporate bonding requirements into two Army contracts by operation of law and whether such incorporation entitled the contractor to an equitable adjustment for increased costs and labor arising from the two-year delay in the contractor’s compliance with these bonding requirements. The Federal Circuit affirmed the Armed Services Board of Contract Appeals (“ASBCA” or “Board”) decision below, holding that the contracts at issue were construction contracts and, in accordance with the Christian doctrine, the standard bonding provisions were required to be incorporated into the contracts by operation of law at the time of contract award because they were mandatory in construction contracts and served a deeply ingrained procurement policy. The Federal Circuit denied K-Con’s claim for costs incurred in complying with the incorporated provisions on the grounds that 1) any ambiguity as to whether the contracts were commercial item or construction contracts was patently ambiguous and triggered K-Con’s duty to inquire during the procurement and 2) K-Con’s failure to inquire in light of this duty precluded K-Con from challenging the nature of the contract as a construction contract.

1. Facts Relating to the Appeal

a. GSA eBuy Procurement of Two Task Order Contracts

On August 23, 2013, the U.S. Property and Fiscal Office for the State of Massachusetts (“USPFO” or “Army”) issued a solicitation for the design and construction of a laundry facility at Camp Edwards, Massachusetts. On September 24, 2013, the Army awarded K-Con a firm fixed price task order contract in the amount of $305,555.00 for this first project.

During this timeframe, on September 5, 2013, the Army also issued a solicitation for the construction of a communications equipment shelter at Camp Edwards, Massachusetts. On September

1 Appeals of K-Con, Inc., ASBCA Nos. 60686, 60687, 17-1 BCA ¶ 36,632 (Jan. 12, 2017) [ASBCA 1], recon. denied, 17-1 BCA ¶___ (May 9, 2017) [ASBCA 2].
2 G. L. Christian & Assocs. v. United States, 312 F. 2d 418 (Ct. Cl. 1963)
3 “[The USPFO is] the Massachusetts National Guard Purchasing and Contracting Division. ... The Massachusetts National Guard Purchasing and Contracting Division provides simplified purchasing and formal contracting support for all elements of the Massachusetts Army and Air National Guard which is accomplished through the local acquisition of materials, equipment, services and construction items not readily available through the established government supply support system. In FY14 we completed 748 contract actions totaling $63.4 million. https://www.massnationalguard.org/purchasing-and-contracting-division.html. “The National Guard, which was founded on December 13, 1636 in Massachusetts, is the oldest component of the Armed Forces of the United States and one of the nation’s longest-enduring institutions. Four of the oldest units in the U.S. Army serve in the Massachusetts Army National Guard today: the 181st Infantry Regiment; the 182nd Cavalry Regiment; the 101st Field Artillery Regiment; and the 101st Engineer Battalion.” https://www.massnationalguard.org/army-national-guard-history.html.
26, 2013, the Army awarded a firm fixed price task order contract in the amount of $356,400.00 to K-Con for this second project.

Both solicitations were issued under the General Services Administration (GSA) eBuy system,\(^4\) and both of these solicitations and their resultant contracts were awarded using a Standard Form 1449 Solicitation/Contract Order for Commercial Items. These contracts did not expressly identify any bonding requirements nor contain the Federal Acquisition Regulation clause 52.228-15, Performance and Payment Bonds.\(^5\) However, the contract line items (CLINs) and Statements of Work (SOWs) for these contracts included construction-related tasks. For example, the laundry facility contract contained a CLIN for the “construction of a new pre-fabricated metal building at Camp Edwards” and the SOW for that contract included tasks for “design and engineering, construction of a concrete building pad and asphalt paving, connections to utilities, installation of pre-engineered metal structure, installation of finishes such as flooring, insulation, drywall, painting, and wall covering.” The communications hut contract contained the CLIN for K-Con to “[c]onstruct Telecom Hut D.” ASBCA I at 2. In addition, the K-Con pricing proposal provided for the “construction of a new pre-engineered metal building” and based K-Con’s pricing and SOW on the “provisions of K-Con’s existing GSA contract, and the construction clauses contained therein.” Id.

b. Army Requires Performance and Payment Bonds Before Issuing Notices To Proceed

Less than one month after the contracts were awarded and before any Notice to Proceed was issued, on October 10, 2013, the Army requested that K-Con obtain performance and payment bonds for these contracts. K-Con responded to the Army, advising that it was unable to provide bonding for the contracts and asking that the Army agree to divide up each contract into three parts under the special item numbers in K-Con’s GSA schedule contract (a Tripartite Agreement), which would reduce the line items below the $150,000 threshold that triggered the bonding requirements. On December 10, 2013, the Government refused to modify the contracts in this regard, but it offered to pay K-Con the bonding fees. It requested that K-Con execute the contract so that work could proceed.

One week later, K-Con sent back the signed contracts, but reiterated its request for a Tripartite Agreement instead of furnishing the bonds. The Government did not accede to K-Con’s request and informed K-Con that it still needed to obtain the bonds before the Government could issue its Notice to Proceed on the contracts.

Over the course of the next nine months, K-Con informed the Army of problems relating to obtaining bonds from its surety. On July 29, 2014, the Army notified K-Con that it planned to terminate the contract for convenience because it had erroneously failed to include the bonding requirement in the contracts. The Army gave K-Con two days to provide the bonds and avoid the termination. K-Con

\(^4\) “Using the eBuy system, federal agencies (buyers) may prepare and post Requests for Quotations (RFQs) for specific supplies (products) and services offered under GSA Schedule and Technology contracts (i.e.; GSA Schedule 70 (Information Technology), Governmentwide Acquisition Contracts (GWACs), and Network Services and Telecommunications). ... State and local government entities (buyers) may now use the eBuy system to prepare and post RFQs for GSA Schedule supplies and services under the Cooperative Purchasing Program and the Disaster Recovery Purchasing Program.” [https://www.gsa.gov/tools/supply-procurement-etools/ebuy/how-does-ebuy-work](https://www.gsa.gov/tools/supply-procurement-etools/ebuy/how-does-ebuy-work).

\(^5\) See Appendix A.
obtained the Army’s agreement to refrain from termination. However, on September 26, 2014, K-Con informed the Army that its surety still would not issue it the performance and payment bonds.

It was not until September 30, 2015, almost two years after the initial contracts were awarded, that K-Con finally obtained the performance and payment bonds. The Army modified the contracts’ periods of performance and compensated K-Con for the cost of the bonding fees. K-Con proceeded with performance and completed the contracts.

c. Requests for Equitable Adjustment (REAs)

Four months after obtaining its bonds and proceeding with performance, in January 2016, K-Con submitted REAs to the Contracting Officer to recover increased costs incurred due to K-Con’s delay in obtaining bonding for the two contracts, a total amount of $116,336.56. The decision indicates that the amount was based on increased costs of material and labor, as well as overhead, profit and “bonding.”\(^6\) The K-Con REAs also claimed entitlement to “all cost escalation that occurred during the period between 24 September 2013 and 30 September 2015 as a result of its [K-Con’s] inability to obtain sufficient bonding.”\(^7\)

On March 2, 2016, the Contracting Officer denied these REAs on the ground that the Army was not responsible for the delay as the Army had notified K-Con of the bonding requirement “almost immediately” after contract award and the delay was due to K-Con’s inability to secure the required bonding.

d. Contracting Officer’s Final Decision and Appeal

K-Con requested final decisions from the Contracting Officer and on July 14, 2016, the Contracting Officer formally denied K-Con’s claims on the ground that “the bonding requirements maintained by federal law and procurement regulation is fundamental to construction contracting with the Federal Government – and would therefore be incorporated into federal contracts via the Christian Doctrine, G.L. Christian & Associates v. United States, 312 F.2d 418 (Ct. Cl. 1963).”

On July 19, 2016, K-Con appealed these final decisions to the Board. They were consolidated and handled under the Board’s accelerated procedure in order to address the legal question of whether the bonding requirements of FAR 52.228-15 were incorporated by operation of law into the contracts at the time of award. By decision dated January 12, 2017, the Board upheld the Contracting Officer’s final decision on the ground that the clause was incorporated by operation of law because it is mandatory for applicable construction projects and represents a significant public procurement policy.

2. Appeal to the Federal Circuit

K-Con appealed the Board’s decision to the Court of Appeals for the Federal Circuit (“Federal Circuit”). On appeal, the Federal Circuit was presented with two questions: 1) whether the contracts were construction contracts and 2) whether the standard bond requirements for construction contracts

\(^6\) The decisions do not define precisely what costs fall within the scope of the asserted “bonding” costs since it appears that the Army had already agreed to pay K-Con its bonding fees in December 2013.

\(^7\) ASBCA 1 at p. 3.
were incorporated into these contracts by operation of law under the Christian Doctrine, *G. L. Christian & Assocs. v. United States*, 312 F. 2d 418 (Ct. Cl. 1963).

A. Federal Circuit determines procurements were patently ambiguous and placed an affirmative duty to inquire on the Contractor

With regard to the first question, K-Con argued that the contracts were commercial item procurements and not construction contracts since they were procured under the GSA eBuy program, using SF 1449 forms applicable to commercial item procurements and, therefore, bonding was not a mandatory requirement.

The Court considered this issue de novo. CAFC at 722. Relying on two prior Federal Circuit decisions, the Court rejected K-Con’s argument. Specifically, it held that K-Con was foreclosed from arguing about its interpretation of the contracts since K-Con failed to duly inquire of the Government in the face of a patent ambiguity regarding the nature of the contracts. The Court found that the ambiguity was patent since “there were many indications that the contracts were for construction, not commercial items.” CAFC at 723. Quoting *Stratos Mobile Networks USA, LC v. United States*, 213 F.3d 1375, 1381 (Fed. Cir. 2000), the Court held that “A patent ambiguity is present when the contract contains facially inconsistent provisions that would place a reasonable contractor on notice and prompt the contractor to rectify the inconsistency by inquiring of the appropriate parties.” CAFC at 722. In contrast, a latent ambiguity is present where the ambiguity is “neither glaring nor substantial nor patently obvious. CAFC at 722 (quoting Cnty. Heating & Plumbing Co. v. Kelso, 987 F. 2d 1575, 1579 (Fed. Cir. 1993)). The Court further found that, although the procurements were issued under commercial item forms, they contained CLINs that identified work to be performed as “construction” or “design and construction,” and included construction-related tasks and the requirement for compliance with the Davis-Bacon Act, and therefore constituted construction contracts.8

B. Federal Circuit determines that bonding requirements were incorporated into the contracts by operation of law

With regard to the second question, the Federal Circuit reviewed the ASBCA’s application of the Christian doctrine de novo to determine whether the performance and payment bond clause and requirements were included in the contracts by operation of law. The Court expressed that its de novo review would be done with “ ‘careful consideration and great respect’ to the Board’s legal interpretations in light of its considerable experience in the field of government contracts, including its experience in interpreting the FAR.” CAFC at 724. Since the bonding clause was not expressly included in the contracts, the Court applied a two-prong test to determine whether incorporation by operation of law would be found: (1) whether the bonding clause was mandatory and (2) whether the bonding clause expresses a “significant or deeply ingrained strand of public procurement policy.” CAFC at 724.

i. Bonding clause was mandatory

---

8 The Davis-Bacon Act requires that contractors pay certain minimum wages to laborers and mechanics performing under a government contract, with a value over $2,000, for the construction, alteration, or repair of public buildings or public works.
The bonding clause at issue, FAR 52.228-15 Performance and Payment Bonds – Construction (OCT 2010), provides that the successful offeror in construction contracts of $150,000 or more “shall furnish performance and payment bonds to the Contracting Officer.” Further, the clause’s bonding requirements implement statutory requirements found in 40 U.S.C. §§ 3131-3134, which provisions had their genesis in the Miller Act issued more than eighty years ago. K-Con argued that the provision was discretionary because other provisions of the FAR policy permitted the Contracting Officer the discretion to revise the bonding requirements; the Federal Circuit disagreed. Citing the recent Supreme Court decision in Kingdomware Techs., Inc. v. United States, ___ U.S. ___, 136 S. Ct. 1969, 1977 (2016), the Court held that the word “shall” “usually connotes a requirement” and equates with “must” and, therefore, the clause and bonding requirements were mandatory. CAFC at 725.

ii. Bonding clause serves significant or deeply ingrained public procurement policy

The Federal Circuit also examined case law and legislative history to determine whether the bonding clause requirements met the second prong of the test – whether it served a significant or deeply ingrained public procurement policy. Citing F.D. Rich Co. v. United States ex rel. Indus. Lumber Co., 417 U.S. 116, 121 (1974), the Court determined that the clause served an important procurement policy by requiring that the prime provide “payment bonds … to provide security for those who furnish labor and materials in the performance of government contracts” since such persons and entities cannot enter into mechanics liens on the federal property to otherwise secure their payments. CAFC at 725. The Court found that the bonding requirement provides an alternative remedy to labors and suppliers with no further cost to the Government if the contractor defaults. Id. at 725-726. Similarly, the Court found that the requirement for performance bonds ensures that the Government receives full performance at the agreed upon cost. The Court determined that these facts were sufficient to establish that the second prong was met – both the performance and payment bond provisions served longstanding and deeply ingrained procurement policy.

iii. Christian Doctrine is not limited to Contract “Administration-Type” Provisions

K-Con also argued that incorporation of the bonding clause would require K-Con to provide a service that it did not offer in the procurement. The Court disagreed, relying on its holding in S.J. Amoroso Construction Co. v. United States, 12 F.3d 1072, 1075-75 (Fed. Cir. 1993), in which it incorporated the Buy American Act provision into a construction contract by operation of law because the statute required that every construction contractor for public buildings and works “shall contain” such a buy American requirement. The Federal Circuit made clear that the Christian doctrine could be applied to incorporate substantive provisions into contracts.

3. Implications of the Decision

Traditionally, the contractor’s requirements are established and governed by the terms expressly set forth in the contract. The Federal Circuit’s application of the Christian doctrine in K-Con has implications beyond the blue-penciling of a clause into a prime contract. In K-Con, there was an apparent patent ambiguity in the solicitation that went unquestioned by the contractor during the
procurement process. The Court foreclosed the contractor from arguing that the contract was not of the type to require the inclusion of the clause because K-Con did not exercise its duty to inquire as to the nature of the contract and the clauses that would apply to it during the procurement process. K-Con, therefore, stands for the proposition that offerors (and contractors) have an affirmative duty to ask questions in the face of any actual or potential ambiguity or omitted clauses, or risk the consequences.

Notably, the contracts in this case were issued under the GSA ebuy purchasing program – one which was for the purpose of engaging in streamlined commercial item contracting. Commercial item contracting laws and regulations do provide that certain noncommercial clauses are not required in such contracts. However, these types of contracting laws and regulations do not provide that all noncommercial terms are excluded unless they are expressly included. And, in fact, commercial item contracts are still required to include applicable government contracting clauses where necessary and to apply these clauses when the applicable triggering terms and thresholds are present. K-Con could not insulate itself from traditional government contract construction bonding requirements by considering these contracts to be commercial item contracts or otherwise ignoring the essential nature of the performance being procured.

In addition to impacting commercial item contracting, K-Con has implications for administration and risk assumption with regard to the subcontracting supply chain. Over the past ten or so years, multiple laws and regulations have been passed to require the inclusion of clauses in commercial and noncommercial contracts for the purpose of policing the government contractor’s supply chain. Contractors are required to engage in affirmative tracking, control, flowdown, and reporting. Supply chain risk rules, such as those that address human trafficking, counterfeit or nonconforming parts, or cyber security concerns, require frequent vetting, tracking and tracing of the contractor supply chain, and the reporting of actual or suspected incidents. Limited carve outs and expansive flowdown requirements pose risks to not only the contractor, but to its covered subcontractors and suppliers down the chain. Many in that chain today may not consider themselves to be government contractors. They rely on the precise terms and provisions in the contract that they are provided in order to ascertain their potential responsibilities, costs, liabilities, and risks. They use the terms of these agreements to set their own delivery terms and conditions. In some cases, the prime contract may be for the provision of a service, but the performance may require the purchase of supplies or construction of facilities. If the provisions for these types of activities are not in the prime contract, is there risk that these provisions may be read into the contract (and subcontracts) after K-Con? The application of the Christian doctrine in K-Con to the prime contractor may result in increased risk to supply chain contractors that know what is being procured of them, but who do not raise questions or inquire about the inclusion or exclusion of particular clauses in their contracts because they are subcontractors. K-Con exhorts all to be more careful, more precise, and when in doubt at all, to seek clarification in the contracting and subcontracting arena, and down through the supply chain, to avoid the risk that different terms and provisions may be applied to them.
Appendix A

52.228-15 Performance and Payment Bonds - Construction.
As prescribed in 28.102-3(a), insert a clause substantially as follows:

PERFORMANCE AND PAYMENT BONDS - CONSTRUCTION (OCT 2010)

(a) Definitions. As used in this clause -

Original contract price means the award price of the contract; or, for requirements contracts, the price payable for the estimated total quantity; or, for indefinite-quantity contracts, the price payable for the specified minimum quantity. Original contract price does not include the price of any options, except those options exercised at the time of contract award.

(b) Amount of required bonds. Unless the resulting contract price is $150,000 or less, the successful offeror shall furnish performance and payment bonds to the Contracting Officer as follows:

(1) Performance bonds (Standard Form 25). The penal amount of performance bonds at the time of contract award shall be 100 percent of the original contract price.

(2) Payment Bonds (Standard Form 25-A). The penal amount of payment bonds at the time of contract award shall be 100 percent of the original contract price.

(3) Additional bond protection.

(i) The Government may require additional performance and payment bond protection if the contract price is increased. The increase in protection generally will equal 100 percent of the increase in contract price.

(ii) The Government may secure the additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.

(c) Furnishing executed bonds. The Contractor shall furnish all executed bonds, including any necessary reinsurance agreements, to the Contracting Officer, within the time period specified in the Bid Guarantee provision of the solicitation, or otherwise specified by the Contracting Officer, but in any event, before starting work.

(d) Surety or other security for bonds. The bonds shall be in the form of firm commitment, supported by corporate sureties whose names appear on the list contained in Treasury Department Circular 570, individual sureties, or by other acceptable security such as postal money order, certified check, cashier's check, irrevocable letter of credit, or, in accordance with Treasury Department regulations, certain bonds or notes of the United States. Treasury Circular 570 is published in the Federal Register or may be obtained from the U.S. Department of the Treasury, Financial Management Service, Surety Bond Branch, 3700 East West Highway, Room 6F01, Hyattsville, MD 20782. Or via the internet at http://www.fms.treas.gov/c570/.

(e) Notice of subcontractor waiver of protection (40 U.S.C. 3133(c)). Any waiver of the right to sue on the payment bond is void unless it is in writing, signed by the person whose right is waived, and executed after such person has first furnished labor or material for use in the performance of the contract.

(End of clause)
ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --

K-Con, Inc.

Under Contract Nos. W912SV-13-F-0100

W912SV-13-F-0121

ASBCA Nos. 60686, 60687

APPEARANCES FOR THE APPELLANT: Robert J. Symon, Esq.
Aron C. Beezley, Esq.
Bradley Arant Boult Cummings LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ Christopher M. Coy, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE WOODROW

In these appeals, appellant, K-Con, Inc., claims a total sum of $116,336.56 arising out of two completed construction contracts. K-Con’s claim is based on increases in costs for materials and labor due to a two-year delay in the issuance of a notice to proceed after the contracts were awarded. According to K-Con, this delay was due solely to the government’s decision to add the performance and payment bond requirements set forth at Federal Acquisition Regulation (FAR) clause 52.228-15, PERFORMANCE AND PAYMENT BONDS – CONSTRUCTION, to each contract. In response, the government contends that FAR 52.228-15 was incorporated into the contracts by operation of law at the time of contract award pursuant to the doctrine set forth in G.L. Christian & Assoc. v. United States, 312 F.2d 418, 424, 427, aff’d on reh’g, 320 F.2d 345 (1963). Appellant has elected to proceed under the Board’s accelerated procedure set forth in Board Rule 12.3.

The sole legal question presented by this appeal is whether the bonding requirements of FAR 52.228-15 were incorporated into Contract Nos. W912SV-13-F-0100 and W912SV-13-F-0121 by operation of law at the time of contract award. We conclude that they were.

FINDINGS OF FACT

On 23 August 2013, the United States Property and Fiscal Office for the State of Massachusetts (Army or government) issued a Request for Quotation (RFQ) No. 815306,
for the design and construction of a laundry facility at Camp Edwards, Massachusetts (R4, tab 3). On 24 September 2013, the government awarded Task Order No. W912SV-13-F-0100 (Contract 0100) to appellant, K-Con, Inc., pursuant to the solicitation (R4, tab 1 at 1). The award was for a firm-fixed-price contract with a total contract value of $305,555.00 (id.).

On 5 September 2013, the Army issued RFQ No. 821234, for the construction of a communications equipment shelter at Camp Edwards, Massachusetts (R4, tab 2). On 26 September 2013, the government awarded Task Order No. W912SV-13-F-0121 (Contract 0121) to K-Con, Inc., pursuant to this solicitation. The award was for a firm-fixed-price contract with a total contract value of $356,400.00. (Id. at 27)

The contracting officer issued both solicitations utilizing the General Services Administration (GSA) eBuy system. The contracting officer used Standard Form 1449, Solicitation/Contract/Order for Commercial Items for both contracts (R4, tabs 2-3). Neither solicitation included an express requirement that the awardee was to provide performance and payment bonds, nor did the solicitations include FAR clause 52.228-15, PERFORMANCE AND PAYMENT BONDS — CONSTRUCTION.

Contract 0100, for the construction of a laundry facility, contains a contract line item number (CLIN) calling for the “[c]onstruction of a new pre-fabricated metal building at Camp Edwards” (R4, tab 1 at 4). Similarly, the relevant CLIN in Contract 0121 requires the contractor to “[c]onstruct Telecom Hut D” (R4, tab 2 at 30). The statements of work for both contracts include many construction-related tasks, including design and engineering, construction of a concrete building pad and asphalt paving, connections to utilities, installation of a pre-engineered metal structure, and installation of finishes such as flooring, insulation, drywall, painting, and wall covering (R4, tabs 1-2).

On 10 October 2013, after awarding both contracts to K-Con, but before issuing a notice to proceed for either contract, the government requested that K-Con provide performance and payment bonds for both contracts (R4, tab 9; answer ¶ 6). On 22 October 2013, K-Con informed the government that it was unable to provide bonding for the contracts. Instead, K-Con offered to divide each contract into three separate special item numbers within its GSA schedule contract, placing each line item of each contract within the $30,000 to $150,000 range in FAR 28.102(b). According to K-Con, this “tripartite agreement” approach would separately secure each line item, in lieu of providing payment and performance bonds for each entire contract (R4, tab 12 at 103-08).

In an email dated 10 December 2013, the government acknowledged that it “fully understands that K-Con will need to charge the Government for the bonding fees” and required a certified receipt from the surety demonstrating that K-Con had paid for the bonds (R4, tab 12 at 102-03). Subsequently, on 29 January 2014, the government
informed K-Con that it would not accept a tripartite agreement for the contracts (R4, tab 13 at 109).

Nearly two years later, on 30 September 2015, K-Con provided the required bonding and the parties modified each contract to increase the total cost to compensate K-Con for the cost of the bonding fees (R4, tabs 26-27).

On 26 January 2016, K-Con submitted a request for equitable adjustment (REA) for each contract, requesting a total sum of $116,336.56 ($53,407.54 for Contract 0100 and $62,929.02 for Contract 0121) (R4, tabs 31, 32). Each REA claimed increases in costs for materials and labor (id.). Each REA also offered comparisons of cost documentation between invoices originating prior to K-Con’s submission of its offers and information gathered from its subcontractors or suppliers in January of 2016 (id.). K-Con also claimed costs for overhead, profit, and “bonding” (id.). Lastly, K-Con claimed an entitlement to an equitable adjustment for all cost escalation that occurred during the period between 24 September 2013 and 30 September 2015 as a result of its inability to obtain sufficient bonding (id.).

DISCUSSION

Under the so-called Christian doctrine, a mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy is considered to be included in a contract by operation of law. Christian, 312 F.2d at 424, 427. Application of the Christian doctrine turns not on whether the clause was intentionally or inadvertently omitted, but on whether procurement policies are being “avoided or evaded (deliberately or negligently) by lesser officials.” Christian, 320 F.2d at 351.

To be included in the contract by operation of law, the contract clause must be both mandatory and represent a significant public procurement policy. In this appeal, the bonding requirements of FAR 52.228-15 satisfy both of these requirements. Therefore, we conclude that FAR 52.228-15 must be incorporated into the contracts by operation of law.

I. FAR 52.228-15 Is Mandatory

We hold that FAR 52.228-15, PERFORMANCE AND PAYMENT BONDS—CONSTRUCTION, is a mandatory clause in a government construction contract. Specifically, both performance and payment bonds are required by statute. 40 U.S.C. §§ 3131-3134 (formerly known as the Miller Act) states, in relevant part:

(b) Type of Bonds Required. – Before any contract of more than $100,000 is awarded for the construction, alteration, or repair of any public building or public work of the Federal
Government, a person must furnish to the Government the following bonds, which become binding when the contract is awarded:

(1) Performance bond. – A performance bond with a surety satisfactory to the officer awarding the contract, and in an amount the officer considers adequate, for the protection of the Government.

(2) Payment bond. – A payment bond with a surety satisfactory to the officer for the protection of all persons supplying labor and material in carrying out the work provided for in the contract for the use of each person. The amount of the payment bond shall equal the total amount payable by the terms of the contract unless the officer awarding the contract determines, in a writing supported by specific findings, that a payment bond in that amount is impractical, in which case the contracting officer shall set the amount of the payment bond. The amount of the payment bond shall not be less than the amount of the performance bond.

This statutory provision plainly states that the performance and payments bonds are mandatory when it states that the contractor “must furnish” the bonds. See Monzo v. Department of Transp., FAA, 735 F.2d 1336 (Fed. Cir. 1984) (holding that statute stating that petition for review “must” be filed within certain timeframe is mandatory).

The FAR codifies these requirements at FAR 28.102-1, Performance and payment bonds and alternative payment protections for construction contracts, which provides:

(a) 40 U.S.C. chapter 31, subchapter III, Bonds (formerly known as the Miller Act), requires performance and payment bonds for any construction contract exceeding $150,000, except that this requirement may be waived –

(1) By the contracting officer for as much of the work as is to be performed in a foreign country upon finding that it is impracticable for the contractor to furnish such bond; or
(2) As otherwise authorized by the Bonds statute or other law. [*]

Although the Miller Act statute and the FAR allow the bonding requirement to be waived in certain circumstances, such as for work to be performed in a foreign country, those circumstances are not present here. 40 U.S.C. § 3131(d); FAR 28.102(a).

Both contracts at issue in this appeal were for the “construction, alteration, or repair of any public building” as that phrase is defined in the Miller Act. The term “public building” has been held to include federally-owned buildings on military bases, based on the rationale that a “public building” is one in which the United States holds title. See, e.g., United States of America for the Use and Benefit of Empire Plastics Corp. v. Western Casualty & Surety Co., 429 F.2d 905, 906 (10th Cir. 1970) (holding that building constructed on property of the United States is a “public building” under the Miller Act). In these appeals, the contracts were for the construction of a laundry facility and communications equipment shelter at Camp Edwards, Massachusetts and, therefore, fall within the definition of “public buildings” (R4, tabs 1-2).

In addition, both contracts at issue in these appeals exceed $150,000 in award price and, therefore, are subject to the requirements of FAR 28.102. Although K-Con offered to enter into a “triaepitite agreement” that presumably would avoid this requirement by dividing each contract’s single CLIN into three separate special item numbers to fall under the $150,000 threshold, the government rejected this approach (R4, tabs 12, 39).

Appellant cites FAR 28.103-2(c) for the proposition that performance and payment bonds “may” be required and are, therefore, discretionary (app. br. at 2). Appellant does not mention, however, that FAR 28.103 pertains to Performance and payment bonds for other than construction contracts (emphasis added). The contracts at issue in these appeals are plainly construction contracts: the relevant CLIN for the laundry facility contract is for the “[c]onstruction of a new pre-fabricated metal building at Camp Edwards” (R4, tab 1 at 4). Similarly, the relevant CLIN in the telecom hut contract requires the contractor to “[c]onstruct Telecom Hut D” (R4, tab 2 at 30). The statements of work for both contracts include a host of construction-related tasks, including design and engineering, construction of a concrete building pad and asphalt paving, connections to utilities, installation of a pre-engineered metal structure, and installation of finishes such as flooring, insulation, drywall, painting, and wall covering (R4, tabs 1-2).

* Pursuant to FAR 13.005, domestic contracts below the simplified acquisition threshold of $150,000 are exempt from Miller Act requirements. See FAR Part 13 (setting forth simplified acquisition procedures).
Appellant additionally asserts, in a footnote to its brief, that the Miller Act does not apply to these contracts, because the contracts were for commercial items (app. br. at 2 n.1). Appellant cites FAR 28.106-4 for this assertion. We disagree, and conclude that FAR 28.106-4 does not render the Miller Act inapplicable to construction contracts, even if those contracts are solicited as commercial items contracts. FAR 28.106-4, Contract clause, states in its entirety:

(a) The contracting officer shall insert the clause at 52.228-2, Additional Bond Security, in solicitations and contracts when bonds are required.

(b) In accordance with Section 806(a)(3) of Pub. L. 102-190, as amended by Sections 2091 and 8105 of Pub. L. 103-355 (10 U.S.C. 2302 note), the contracting officer shall insert the clause at 52.228-12, Prospective Subcontractor Requests for Bonds, in solicitations and contracts with respect to which a payment bond will be furnished pursuant to the 40 U.S.C. chapter 31, subchapter III, Bonds (see 28.102-1), except for contracts for the acquisition of commercial items as defined in Subpart 2.1.

Although this provision contains a reference to the Miller Act (40 U.S.C. chapter 31, subchapter III, Bonds), it does not state that the Miller Act is inapplicable to commercial item contracts. By its terms, FAR 28.106-4 pertains to the inclusion of specific contract clauses in contracts that already include bonding requirements. Specifically, FAR 28.106-4(a) states that the CO must include the Additional Bond Security clause set forth at FAR 52.228-2, while FAR 28.106-4(b) states that the CO must include FAR 52.228-12, PROSPECTIVE SUBCONTRACT REQUESTS FOR BONDS, in the contract unless the contract is for commercial items.

At issue here, however, is whether these contracts must contain FAR 52.228-15, not FAR 52.228-2. FAR 52.228-2, ADDITIONAL BOND SECURITY pertains to situations in which the contractor already has supplied bonds for the project and the surety or other financial institutions issuing the bond becomes unacceptable to the government. Therefore, we conclude that the Miller Act applies to construction contracts, even when those contracts are solicited as commercial items, and requires those contracts to contain FAR 52.228-15.

Finally, although FAR 28.102-2 allows a contracting officer to reduce the bond requirement in certain circumstances, the contracting officer in this case did not find any circumstances that would authorize a reduction (R4, tab 9). Moreover, the discretion to reduce the bond requirement does not allow the contracting officer to forego the bond
requirement altogether. Therefore, we conclude that FAR 52.228-15 was a mandatory clause in the contract.

II. Bonding Requirements Are Significant Components of Public Procurement Policy

Next, we conclude that bonding requirements are a significant component of public procurement policy. *General Engineering & Machine Works v. O'Keefe*, 991 F.2d 775, 779-80 (Fed. Cir. 1993) (holding that mandatory provisions that "express a significant or deeply ingrained strand of public procurement policy" must be incorporated into the affected contract).

A principal underlying purpose of the payment bond provision of the Miller Act is "to ensure that subcontractors are promptly paid in full for furnishing labor and materials to federal construction projects." *United States ex rel. Acoustical Concepts, Inc. v. Travelers Casualty and Surety Co. of America*, 635 F. Supp. 2d 434, 438 (E.D. Va. 2009). In particular, "the Miller Act provides subcontractors on federal construction projects with the functional equivalent of a mechanic's lien typically available to subcontractors on non-federal projects." *Id.* at 439. Under the doctrine of sovereign immunity, mechanics’ liens cannot be placed against public property. *Aetna Casualty and Surety Co. v. United States*, 655 F.2d 1047, 1057 (Ct. Cl. 1981) (citing *Armstrong v. United States*, 364 U.S. 40, 46 (1960)). Therefore, the payment bond is the only protection subcontractors have against the prime contractor's nonpayment.

The purpose of a performance bond is to "assure that the government has a completed project for the agreed contract price." *Trinity Universal Ins. Co. v. United States*, 382 F.2d 317, 321 (5th Cir. 1967). Indeed, the Miller Act provides protection to the government in situations where the prime contractor defaults in the performance of its work or is terminated for cause. In those situations, the surety either may step in or take over the general contractor's obligations under the prime contract, or may pay the government for the costs incurred by the government in completing the job. *Id.*

Our decision in *Austin Elcon Corp.* illustrates the importance of performance and payment bonds. In *Austin Elcon Corp.*, we held that appellant’s provision of a bid bond did not excuse it from timely furnishing performance and payment bonds once the government awarded it a contract requiring such bonds. *Austin Elcon Corp.*, ASBCA No. 26215, 82-1 BCA ¶ 15,718 at 77,763. We stated that the "requirement for performance and payment bonds is substantial and cannot be brushed off as merely 'technical requirement[s] for additional proof of bond' as appellant suggests." *Id.* Further illustrating the importance of adequate bonding is the well-established proposition that the failure to furnish required performance and payment bonds constitutes a breach justifying termination of a contract for default. *Walsh Constr. Co. of Illinois*, ASBCA No. 52952, 02-2 BCA ¶ 32,024.
In sum, we find that, in the context of these contracts for the construction of public buildings, bonding requirements are mandatory and represent a significant component of public procurement policy. Therefore, the bonding requirements set forth in FAR 52.228-15 were considered to be included in the contracts by operation of law pursuant to the doctrine set forth in Christian, 312 F.2d 418.

CONCLUSION

The appeals are denied.

Dated: 12 January 2017

KENNETH D. WOODROW
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 60686, 60687, Appeals of K-Con, Inc., rendered in conformance with the Board’s Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals
ARMS SERVICES BOARD OF CONTRACT APPEALS

Appeals of --
K-Con, Inc. ASBCA Nos. 60686, 60687

APPEARANCES FOR THE APPELLANT:
Robert J. Symon, Esq.
Aron C. Beezley, Esq.
Bradley Arant Boult Cummings LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT:
Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ Christopher M. Coy, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE WOODROW
ON APPELLANT’S MOTION FOR RECONSIDERATION


DISCUSSION

In deciding a motion for reconsideration, we examine whether the motion is based upon newly discovered evidence, mistakes in our findings of fact, or errors of law. Zulco International, Inc., ASBCA No. 55441, 08-1 BCA ¶33,799 at 167,319. A motion for reconsideration does not provide the moving party the opportunity to reargue its position or to advance arguments that properly should have been presented in an earlier proceeding. See Dixon v. Shinseki, 741 F.3d 1367, 1378 (Fed. Cir. 2014). We do not grant motions for reconsideration absent a compelling reason. J.F. Taylor, Inc., ASBCA Nos. 56105, 56322, 12-2 BCA ¶35,125 at 172,453.
I. *Faerber Electric* Does Not Compel a Different Result

K-Con first contends that the Board improperly ignored K-Con’s argument in its initial brief concerning the U.S. District Court’s opinion in *Faerber Electric*. Although K-Con acknowledges that decisions of United States District Courts are not binding on the Board, it contends that we should find the Court’s decision persuasive, particularly given the absence of Board precedent on the precise issue.

*Faerber Electric* holds that, absent a bond being obtained, there is no claim directly under the Miller Act statute. We did not hold that the Miller Act is self-implementing in the sense that it creates a cause of action. Instead, we held that, pursuant to the *Christian* doctrine, the bonding requirements set forth in the Miller Act (and codified at FAR 52.228-15) are mandatory clauses that must be included in government construction contracts if they are omitted. We did not reach the further question – at issue in *Faerber Electric* – of whether a subcontractor possesses a right of action to sue the prime contractor if the prime contractor did not obtain a bond in connection with its contract with the government.

While it is true that *Faerber Electric* concluded that the Miller Act is *not* implicitly incorporated into any federal contract covered by the Act, it did so in the context of determining whether a subcontractor possessed a right of action against a prime contractor based on the presumption that the prime contractor would have obtained a bond pursuant to the Miller Act. 795 F. Supp. at 246 (citing, *inter alia,* G.L. *Christian & Assoc.*s. v. United States, 320 F.2d 345, 350-51 (1963)). Because the prime contractor’s contract with the government did not include a bonding requirement, and the prime contractor did not obtain a bond, there was no bond on which the subcontractor could sue. The Court refused to create an implied cause of action to fill the lacuna created when both the contractor and the government contracting officer ignore the bonding requirement.

The conclusion in *Faerber Electric* – that the Miller Act bonding requirement is not implicitly incorporated into federal contracts covered by the Act – did not rest on analysis of the *Christian* doctrine. Specifically, *Faerber Electric* did not delve into whether the bonding requirement is a mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy. *G.L. Christian & Associates v. United States*, 312 F.2d 418, 424, 427 (Ct. Cl. 1963). Instead, *Faerber Electric*’s analysis focused on whether the Miller Act bonding requirement should be incorporated into the government contract for the purpose of creating a private right of action. *Faerber Electric* cited the Supreme Court’s ruling in *Universities Research Association, Inc. v. Coutu*, 450 U.S. 754 (1981) for a precedential test to determine whether a statute may create an implied right of action.
For these reasons, we did not consider *Faerber Electric* persuasive and did not rely on it in our analysis of the *Christian* doctrine.

II. Consideration of FAR 12.301 Does Not Alter Our Holding

K-Con next contends that FAR 52.228-15 should not be incorporated into the contracts at issue because they are commercial items contracts (app. mot. at 3). K-Con relies on FAR 12.301, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items, which sets forth the solicitation provisions and clauses to be included in a contract for the acquisition of commercial items (app. mot. at 3). K-Con contends that, because FAR 52.228-15 is not among the clauses listed in FAR 12.301, it is not mandatory in commercial items contracts (*id.*).

We rejected this very argument in our original decision when we held that “[b]oth contracts at issue in this appeal were for the ‘construction, alteration, or repair of any public building’” as that phrase is defined in the Miller Act. 17-1 BCA ¶ 36,632 at 178,413. We further held that “the Miller Act applies to construction contracts, even when those contracts are solicited as commercial items, and requires those contracts to contain FAR 52.228-15.” *Id.* at 178,414. We see no reason to abandon this holding merely because the Army elected to use commercial items procurement procedures to contract for the construction of these buildings.

Moreover, by its terms, FAR 12.301 does not *preclude* the extant incorporation of FAR 52.228-15 into commercial items contracts. FAR 12.301(a) states that commercial items contracts “shall, to the maximum extent practicable, include only those clauses –

(1) Required to implement provisions of law or executive orders applicable to the acquisition of commercial items; or (2) Determined to be consistent with customary commercial practice” (emphasis added). As we concluded in our original decision, the record evidence demonstrates that these contracts were for construction-related activities and involved the types of risks generally associated with construction projects. 17-1 BCA ¶ 36,632 at 178,413-14. Therefore, we properly concluded that the contracts must include FAR 52.228-15.

Ultimately, K-Con recycles arguments made in its original motion. A motion for reconsideration is not the place to present arguments previously made and rejected. “[W]here litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again. Motions for reconsideration do not afford litigants the opportunity to take a ‘second bite at the apple’ or to advance arguments that properly should have been presented in an earlier proceeding.” *Dixon*, 741 F.3d at 1378 ( citations omitted); see also *Avant Assessment, LLC*, ASBCA No. 58867, 15-1 BCA ¶ 36,137 at 176,384.
CONCLUSION

For these reasons, K-Con’s motion for reconsideration is denied.

Dated: 8 May 2017

KENNETH D. WOODROW
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 60686, 60687, Appeals of K-Con, Inc. rendered in conformance with the Board’s Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals
United States Court of Appeals for the Federal Circuit

K-CON, INC.,
   Appellant

v.

SECRETARY OF THE ARMY,
   Appellee

2017-2254


Decided: November 5, 2018

ROBERT J. SYMON, Bradley Arant Boult Cummings LLP, Washington, DC, argued for appellant. Also represented by ARON C. BEEZLEY.

JESSICA R. TOPLIN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for appellee. Also represented by JOSEPH H. HUNT, ROBERT E. KIRSCHMAN, JR., STEVEN J. GILLINGHAM.
ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )
K-Con, Inc. ) ASBCA Nos. 60686, 60687
) W912SV-13-F-0121 )

APPEARANCES FOR THE APPELLANT: Robert J. Symon, Esq.
Aron C. Beezley, Esq.
Bradley Arant Boult Cummings LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ Christopher M. Coy, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE WOODROW
ON APPELLANT’S MOTION FOR RECONSIDERATION


**DISCUSSION**

In deciding a motion for reconsideration, we examine whether the motion is based upon newly discovered evidence, mistakes in our findings of fact, or errors of law. *Zulco International, Inc.*, ASBCA No. 55441, 08-1 BCA ¶ 33,799 at 167,319. A motion for reconsideration does not provide the moving party the opportunity to reargue its position or to advance arguments that properly should have been presented in an earlier proceeding. *See Dixon v. Shinseki*, 741 F.3d 1367, 1378 (Fed. Cir. 2014). We do not grant motions for reconsideration absent a compelling reason. *J.F. Taylor, Inc.*, ASBCA Nos. 56105, 56322, 12-2 BCA ¶ 35,125 at 172,453.
I. *Faerber Electric* Does Not Compel a Different Result

K-Con first contends that the Board improperly ignored K-Con's argument in its initial brief concerning the U.S. District Court's opinion in *Faerber Electric*. Although K-Con acknowledges that decisions of United States District Courts are not binding on the Board, it contends that we should find the Court's decision persuasive, particularly given the absence of Board precedent on the precise issue.

*Faerber Electric* holds that, absent a bond being obtained, there is no claim directly under the Miller Act statute. We did not hold that the Miller Act is self-implementing in the sense that it creates a cause of action. Instead, we held that, pursuant to the *Christian* doctrine, the bonding requirements set forth in the Miller Act (and codified at FAR 52.228-15) are mandatory clauses that must be included in government construction contracts if they are omitted. We did not reach the further question – at issue in *Faerber Electric* – of whether a subcontractor possesses a right of action to sue the prime contractor if the prime contractor did not obtain a bond in connection with its contract with the government.

While it is true that *Faerber Electric* concluded that the Miller Act is not implicitly incorporated into any federal contract covered by the Act, it did so in the context of determining whether a subcontractor possessed a right of action against a prime contractor based on the presumption that the prime contractor would have obtained a bond pursuant to the Miller Act. 795 F. Supp. at 246 (citing, *inter alia*, *G.L. Christian & Assocs. v. United States*, 320 F.2d 345, 350-51 (1963)). Because the prime contractor's contract with the government did not include a bonding requirement, and the prime contractor did not obtain a bond, there was no bond on which the subcontractor could sue. The Court refused to create an implied cause of action to fill the lacuna created when both the contractor and the government contracting officer ignore the bonding requirement.

The conclusion in *Faerber Electric* – that the Miller Act bonding requirement is not implicitly incorporated into federal contracts covered by the Act – did not rest on analysis of the *Christian* doctrine. Specifically, *Faerber Electric* did not delve into whether the bonding requirement is a mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy. *G.L. Christian & Associates v. United States*, 312 F.2d 418, 424, 427 (Ct. Cl. 1963). Instead, *Faerber Electric*’s analysis focused on whether the Miller Act bonding requirement should be incorporated into the government contract for the purpose of creating a private right of action. *Faerber Electric* cited the Supreme Court’s ruling in *Universities Research Association, Inc. v. Coutu*, 450 U.S. 754 (1981) for a precedential test to determine whether a statute may create an implied right of action.
For these reasons, we did not consider *Faerber Electric* persuasive and did not rely on it in our analysis of the *Christian* doctrine.

II. Consideration of FAR 12.301 Does Not Alter Our Holding

K-Con next contends that FAR 52.228-15 should not be incorporated into the contracts at issue because they are commercial items contracts (app. mot. at 3). K-Con relies on FAR 12.301, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items, which sets forth the solicitation provisions and clauses to be included in a contract for the acquisition of commercial items (app. mot. at 3). K-Con contends that, because FAR 52.228-15 is not among the clauses listed in FAR 12.301, it is not mandatory in commercial items contracts (*id.*).

We rejected this very argument in our original decision when we held that "[b]oth contracts at issue in this appeal were for the ‘construction, alteration, or repair of any public building’" as that phrase is defined in the Miller Act. 17-1 BCA ¶ 36,632 at 178,413. We further held that “the Miller Act applies to construction contracts, even when those contracts are solicited as commercial items, and requires those contracts to contain FAR 52.228-15.” *Id.* at 178,414. We see no reason to abandon this holding merely because the Army elected to use commercial items procurement procedures to contract for the construction of these buildings.

Moreover, by its terms, FAR 12.301 does not preclude the extant incorporation of FAR 52.228-15 into commercial items contracts. FAR 12.301(a) states that commercial items contracts “shall, to the maximum extent practicable, include only those clauses – (1) Required to implement provisions of law or executive orders applicable to the acquisition of commercial items; or (2) Determined to be consistent with customary commercial practice” (emphasis added). As we concluded in our original decision, the record evidence demonstrates that these contracts were for construction-related activities and involved the types of risks generally associated with construction projects. 17-1 BCA ¶ 36,632 at 178,413-14. Therefore, we properly concluded that the contracts must include FAR 52.228-15.

Ultimately, K-Con recycles arguments made in its original motion. A motion for reconsideration is not the place to present arguments previously made and rejected. “[W]here litigants have once battled for the court’s decision, they should neither be required, nor without good reason permitted, to battle for it again. Motions for reconsideration do not afford litigants the opportunity to take a ‘second bite at the apple’ or to advance arguments that properly should have been presented in an earlier proceeding.” *Dixon*, 741 F.3d at 1378 (citations omitted); see also *Avant Assessment, LLC*, ASBCA No. 58867, 15-1 BCA ¶ 36,137 at 176,384.
CONCLUSION

For these reasons, K-Con’s motion for reconsideration is denied.

Dated: 8 May 2017

KENNETH D. WOODROW
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 60686, 60687, Appeals of K-Con, Inc. rendered in conformance with the Board’s Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals
K-Con, Inc. v. Secretary of the Army

Before REYNA, BRYSON, and STOLL, Circuit Judges.

STOLL, Circuit Judge.

K-Con, Inc. and the Army entered into two contracts for pre-engineered metal buildings. The Armed Services Board of Contract Appeals (“Board”) held that bonding requirements were included in the contracts by operation of law at the time they were awarded, pursuant to the Christian doctrine. See G. L. Christian & Assocs. v. United States (Christian I). K-Con appeals. We conclude that the two contracts are construction contracts and that, under the Christian doctrine, the standard bond requirements in construction contracts were incorporated into K-Con’s contracts by operation of law. Accordingly, we affirm.

I

K-Con claims that, after the Army awarded two contracts for pre-engineered metal buildings, the Army delayed issuance of a notice to proceed for two years, resulting in $116,336.56 in increases in costs and labor. According to K-Con, this delay was due solely to the government’s decision to add to each contract the performance and payment bonds set forth in Federal Acquisition Regulation (“FAR”) 52.228-15, Performance and Payment Bonds—Construction.

In September 2013, the government awarded to K-Con task orders for the design and construction of a laundry facility and the construction of a communications equipment shelter at Camp Edwards, Massachusetts. The contracting officer issued both solicitations using the

General Services Administration eBuy system using Standard Form 1449, Solicitation/Contract/Order for Commercial Items. Neither solicitation included an express requirement that K-Con provide performance and payment bonds. Nor did the solicitations include FAR clause 52.228-15, Performance and Payment Bonds—Construction, the standard language for performance and payment bonds included in government construction contracts, mirroring the requirements in FAR 28.102-2(b).

In October 2013, the Army instructed K-Con to provide performance and payment bonds in accordance with FAR 28.102-2(b) before the Army could issue its notice to proceed with the contracts. Nearly two years later, in September 2015, K-Con provided the required bonds and the parties modified each contract to compensate K-Con for the cost of the bonding fees. In January 2016, K-Con submitted a request for equitable adjustment (“REA”) for each contract, requesting a total of $116,336.56² for increases in costs and labor over the two-year period. Subsequently, the contracting officer issued Final Decisions for each contract. The contracting officer determined that the contracts were for construction, and therefore the performance and payment bond requirements were mandatory. The contracting officer further denied both requests on the basis that the bond requirements set forth in FAR 58.228-15 were incorporated into the contracts at the time they were awarded, under the Christian doctrine. On appeal, the Board agreed with the contracting officer. K-Con filed a motion for reconsideration, which the Board denied.

K-Con appeals, seeking reversal of the Board’s determination. K-Con argues that the contracts were not construction contracts and, alternatively, that the bond

² $62,929.02 for the Telecom Hut-D contract and $53,407.54 for the laundry facility contract.
requirements were not incorporated into the contracts by way of the Christian doctrine. Based on these arguments, K-Con requests a remand to the Board to determine the amount to be awarded for K-Con’s claims. We have jurisdiction under 28 U.S.C. § 1295(a)(10).

II

A

K-Con first argues that the Board erred in holding that the contracts at issue are construction contracts. K-Con asserts that they are contracts for commercial items, which do not carry mandatory bonding requirements. The government responds that both contracts are patently ambiguous as to whether they are construction contracts and, thus, it was incumbent on K-Con to inquire as to whether the contracts were for construction or commercial items. Because it did not do so, the government contends that K-Con is precluded from now arguing that the contracts are for commercial items. We agree.

“A patent ambiguity is present when the contract contains facially inconsistent provisions that would place a reasonable contractor on notice and prompt the contractor to rectify the inconsistency by inquiring of the appropriate parties.” Stratos Mobile Networks USA, LLC v. United States, 213 F.3d 1375, 1381 (Fed. Cir. 2000). This is distinct from a latent ambiguity, which exists when the ambiguity is “neither glaring nor substantial nor patently obvious.” Cmty. Heating & Plumbing Co. v. Kelso, 987 F.2d 1575, 1579 (Fed. Cir. 1993) (citing Mountain Home Contractors v. United States, 425 F.2d 1260, 1264 (Ct. Cl. 1970)). We review de novo both the existence of an ambiguity and whether any ambiguity is patent or latent because they are both issues of law. Stratos, 213 F.3d at 1380 (citing Grumman Data Sys. Corp. v. Dalton, 88 F.3d 990, 997 (Fed. Cir. 1996)).
We conclude that the contracts were patently ambiguous. On the one hand, as the Army admits, if the contracts had been issued using the standard construction contract form, they would have been construction contracts without any ambiguity. But that is not what happened here. Instead, these contracts issued using the standard commercial items contract form. The line item descriptions even included the phrase “FOB: Destination,” which is typically used for commercial items contracts. J.A. 31, 53.

On the other hand, there were many indications that the contracts were for construction, not commercial items. For example, the contract line item descriptions for both contracts, which “identify the supplies or services to be acquired,” were for construction activities. See generally FAR part 4.10 (establishing uniform use of line items). The communications shelter contract required the contractor to “[c]onstruct Telecom Hut D.” J.A. 57. Similarly, in the laundry facility contract, the contract line item number called for “[c]onstruction of a new pre-fabricated metal building.” J.A. 31. According to the statement of work in the laundry facility contract, the project scope included “design and construction.” J.A. 32. Indeed, the statement of work included many construction-related tasks, including developing and submitting construction plans, obtaining construction permits, and cleaning up construction areas. The statement of work also required compliance with FAR regulations relevant only to construction contracts as well as Davis-Bacon wages, which

---

3 Enacted in 1931, the Davis-Bacon Act is intended to protect communities and workers from the economic disruption caused by competition from non-local contractors coming into an area and obtaining federal construction contracts by underbidding local wage levels. The Davis-Bacon Act, as amended, requires that each gov-
are likewise only applicable to construction contracts. The use of the commercial items solicitations form and the construction-related terms of the contracts themselves were facially inconsistent indications that would have placed a reasonable contractor on notice that the contracts are patently ambiguous.

Because the solicitations contained contract language that was patently ambiguous, K-Con cannot argue that its interpretation was proper unless K-Con contemporaneously sought clarification of the language from the Army. See Grumman, 88 F.3d at 998 (addressing the issue in the context of a bid protest). K-Con did not seek such clarification and therefore cannot now argue that the contracts should be for commercial items.

B

We now turn to K-Con’s second argument. According to K-Con, even if the contracts were properly considered construction contracts, the Board erred in holding that the contracts included bond requirements under the Christian doctrine.

Here, the relevant regulation is FAR 52.228-15, which requires the offeror in construction contracts valued at over $150,000 to furnish performance and payment bonds:

As prescribed in 28.102-3(a), insert a clause substantially as follows:

Performance and Payment Bonds — Construction (OCT 2010)

Government contract over $2,000 for the construction, alteration, or repair of public buildings or public works shall contain a clause with the minimum wages to be paid to certain laborers and mechanics employed under the contract. See 40 U.S.C. § 3142.
(b) Amount of required bonds. Unless the resulting contract price is $150,000 or less, the successful offeror shall furnish performance and payment bonds to the Contracting Officer as follows:

   (1) Performance bonds (Standard Form 25). The penal amount of performance bonds at the time of contract award shall be 100 percent of the original contract price.

   (2) Payment Bonds (Standard Form 25-A). The penal amount of payment bonds at the time of contract award shall be 100 percent of the original contract price.

FAR 52.228-15 (emphasis added); see also 40 U.S.C. § 3131(b); FAR 28.102-1(a).

Neither contract expressly incorporated this required clause. However, under the Christian doctrine, a court may insert a clause into a government contract by operation of law if that clause is required under applicable federal administrative regulations. See Gen. Eng’g & Mach. Works v. O’Keefe, 991 F.2d 775, 779 (Fed. Cir. 1993) (citing Christian I, 312 F.2d at 424, 427). In Christian, the Court of Claims concluded that the standard termination clause required by the Armed Service Procurement Regulations must be read into the contract, even though the contract lacked a termination clause. Christian I, 312 F.2d at 424–26. Accordingly, the court denied the contractor’s breach-of-contract claim when the government terminated the construction contract for its own convenience. Id. at 427. For a court to incorporate a clause into a contract under the Christian doctrine, it generally must find (1) that the clause is mandatory; and (2) that it expresses a significant or deeply ingrained

We review the Board’s determinations on the applicability of the Christian doctrine de novo. Id. at 779–80 (applying de novo review to determine whether the Christian doctrine incorporated a contract clause regarding material handling costs by operation of law). In applying a de novo review, however, we give “careful consideration and great respect” to the Board’s legal interpretations in light of its considerable experience in the field of government contracts, including its experience in interpreting the FAR. Fruin–Colnon Corp. v. United States, 912 F.2d 1426, 1429 (Fed. Cir. 1990); see Titan Corp. v. West, 129 F.3d 1479, 1481 (Fed. Cir. 1997). We turn now to the two prongs of the Christian doctrine analysis.

1

Under the first prong of the Christian doctrine, we examine whether the bonding requirements are “mandatory” in government construction contracts. See Gen. Eng’g & Mach. Works, 991 F.2d at 779–80. We conclude that they are because they are required by statute.

The statute, 40 U.S.C. §§ 3131–34, formerly known as the Miller Act, requires that “[b]efore any contract of more than $100,000 is awarded for the construction, alteration, or repair of any public building or public work of the Federal Government, a person must furnish to the Government [performance and payment] bonds, which become binding when the contract is awarded.” 40 U.S.C. §§ 3131(b) (emphasis added). The statute is implemen-
ted4 at FAR 28.102-1: “40 U.S.C. chapter 31, subchapter

4 The regulatory threshold ($150,000) is higher than the statutory threshold ($100,000), because the former was adjusted for inflation. Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related
III, Bonds (formerly known as the Miller Act), requires performance and payment bonds for any construction contract exceeding $150,000.” FAR 28.102-1 (emphasis added). In such a circumstance, FAR 28.102-3(a), Contract Clauses, specifies that the clause at FAR 52.228-15, Performance and Payment Bonds—Construction, which is at issue in this appeal, should be inserted in the solicitations and contracts for construction. FAR 28.102-3. Accordingly, because the statute explicitly states that the bonds “must” be furnished and the FAR both requires the bonds and directs insertion of the relevant clause, we conclude that the bond requirements are mandatory.

K-Con argues that FAR 52.228-15 is not mandatory for construction contracts because FAR 28.102-3(a), which requires incorporation of FAR 52.228-15 into construction contracts, purportedly indicates that it is not a mandatory clause. To support its argument, K-Con points to language in FAR 28.102-3(a) stating: “[t]he contracting officer may revise [the performance and payment bonds sections] of the clause to establish a lower percentage.” FAR 28.102-3(a). Thus, K-Con argues, the application is based on the exercise of judgment or discretion of the contracting officer, who can waive the bonding requirements. We are not persuaded. That the contracting officer could revise the bond requirements does not change the fact that the bonding requirements are mandatory for construction contracts over $150,000, like the contracts here. Instead, the words “must” and “shall” in the statutory and regulatory language establish that the requirement to furnish performance and payment bonds is mandatory. Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1977 (2016) (stating that “the word ‘shall’ usually connotes a requirement” and equating “shall”

with “must”). Accordingly, we affirm the Board’s conclusion that the bonding requirements are mandatory and satisfy the first prong of the Christian doctrine.

2

Under the second prong of the Christian doctrine, we examine whether the payment and performance bond requirements “express a significant or deeply ingrained strand of public procurement policy.” See Gen. Eng’g & Mach. Works, 991 F.2d at 779–80 (discussing Christian I, 312 F.2d at 426; G. L. Christian & Assocs. v. United States (Christian II), 320 F.2d 345, 350–51 (Ct. Cl. 1963)). We conclude that they do.

Payment bonds are intended to provide security for those who furnish labor and materials in the performance of government contracts. F.D. Rich Co. v. United States ex rel. Indus. Lumber Co., 417 U.S. 116, 121 (1974). For private contracts, subcontractors and suppliers can obtain a mechanic’s lien against the improved property to ensure that they are paid. Id. at 122. Government property, however, cannot be subject to subcontractors’ and suppliers’ liens. Thus, the payment bonds requirement was created to provide, in government contracts, an alternative remedy to protect those who supply labor or materials to a contractor on a federal project. See id. Performance bonds protect the government by ensuring that a contract will be completed with no further cost to the government even if the contractor defaults. Ins. Co. of the W. v. United States, 243 F.3d 1367, 1370 (Fed. Cir. 2001).

Indeed, the legislative history reflects that Congress has long sought to protect subcontractors and suppliers and to ensure that the Government receives full performance at the agreed-upon cost, dating back to the 1894 enactment of the Heard Act, which preceded the Miller Act. See Miller Act, 49 Stat. at 794 (repealing the Heard Act, 28 Stat. 278 (1894), which was codified at 40 U.S.C. § 270). Based on this long-standing statute and its legislative history, we conclude that the payment and performance bond requirements are “deeply ingrained” in procurement policy. Citing Grade-Way Construction v. United States, 7 Cl. Ct. 263, 265 (1985), K-Con nonetheless asserts that, if the bonding requirements were deeply ingrained into procurement policies, the government should have rejected K-Con’s bond-less contract bids as nonresponsive. We are not persuaded by K-Con’s argument. As an initial matter, we note that Grade-Way, a decision from the Claims Court, is not binding authority on this court. Furthermore, Grade-Way applies the Christian doctrine to minimum wage requirements, not bond requirements. Thus, it has little persuasive force when considering whether the payment and performance bond requirements are “deeply ingrained” in procurement policy.

Moreover, Grade-Way is distinguishable on its facts. The issue in Grade-Way was whether the lowest bidder’s bid was nonresponsive for failing to include a statutorily-required minimum wage provision. The Davis-Bacon Act required the bid to “contain a provision stating the minimum wages to be paid various classes of laborers and mechanics.” 40 U.S.C. § 3142. The bid solicitation, by amendment, also specified that solicitations should include a minimum wage provision. The lowest bidder failed to include the statutorily required specific wage schedules in its bid or otherwise acknowledge the amendment containing the modified wage schedules and
rates. The bidder asserted that the missing wage schedules should be read into its bid by operation of the Christian doctrine and therefore its bid would still be responsive. The Claims Court concluded that because the solicitation's amendment explicitly included a specific wage requirement, the awardee was required to acknowledge the obligation to pay that specific wage. Because it had not done so, the court found the bid nonresponsive. Grade-Way, 7 Cl. Ct. at 271–73. Here, the solicitation did not explicitly require payment or performance bonds, whereas in Grade-Way, the bid amendment explicitly set forth the required wage determinations. Accordingly, the situation is not analogous and Grade-Way is not on point.

K-Con similarly relies on Grade-Way to assert that the Christian doctrine is inapplicable because applying it would require K-Con to provide a service that it did not offer. In Grade-Way, the Claims Court noted that “application of a doctrine of contract construction developed by the courts, such as the Christian Doctrine with respect to incorporation by operation of law, cannot be applied in direct conflict with the clear terms of the statute (and regulations) requiring physical incorporation.” Grade-Way, 7 Cl. Ct. at 271. But Grade-Way is again inapposite. There, the Claims Court declined to apply the Christian doctrine because doing so would directly conflict with the clear terms of the statute and regulations. Grade-Way, 7 Cl. Ct. at 271. The Federal Circuit, however, rejected this narrow approach in S.J. Amoroso Construction Co. v. United States, 12 F.3d 1072, 1075–76 (Fed. Cir. 1993). S.J. Amoroso involved the Buy American Act, which required in express terms that every construction contract for public buildings and works “shall contain a provision that in the performance of the work” only American materials would be used. 41 U.S.C. § 8303 (formerly 41 U.S.C. § 10b); S.J. Amoroso, 12 F.3d at 1075. Instead of using the corresponding FAR clause for construction
contracts, however, the contract included the FAR clause applicable to a different type of contract. Despite the fact that clear terms of the statute (and regulations) required physical incorporation, we held that the Christian doctrine applied and the clause was properly incorporated by operation of law. *S.J. Amoroso*, 12 F.3d at 1077. Here, we follow our precedent in *S.J. Amoroso* and conclude that the payment and performance bond requirements are properly incorporated by operation of law despite the fact that the clear terms of the statute and regulations require physical incorporation.

Finally, K-Con characterizes other Christian doctrine cases as applying only to “contract administration-type provisions.” Appellant Br. at 27. In *Grade-Way*, the court noted:

The Christian doctrine has been applied essentially to clauses involving the government’s administration of a contract (such as terminations, changes, and the like), but not to specific terms and specifications. Moreover, the clauses customarily encompassed by that doctrine have contained provision for compensation to the contractor for any increased costs (if not, in all cases, including profits or consequential damages). We know of no authority which would apply the Christian doctrine to a situation of this type or which would permit the reading into a solicitation of higher wage determinations (with no concomitant increase in the bid price).

*Grade-Way*, 7 Cl. Ct. at 271; see *Gen. Eng’g & Mach. Works*, 991 F.2d at 780 (incorporating payments clause that required separate cost pools); *Chris Berg, Inc. v. United States*, 426 F.2d 314, 317–18 (Ct. Cl. 1970) (holding that missing “mistake in bids” clause required under the Armed Services Procurement Regulation be incorporated into the contract because the clause was written for
the protection of contract bidders); Appellant Br. at 27 (citing *Christian II*, 320 F.2d at 349 (incorporating termination for convenience provision)). Even if we were to accept K-Con’s premise that the provisions in other *Christian* doctrine cases are “administration-type provision[s],” we are aware of no case that limits the *Christian* doctrine to such “administration-type” provisions. Indeed, we have applied the *Christian* doctrine to substantive provisions like the one in this case. For example, in *S.J. Amoroso*, we applied the *Christian* doctrine to require, under the Buy American Act, that the contract at issue “contain a provision that in the performance of the work” only American materials will be used. 12 F.3d at 1075–76. Ultimately, we do not find K-Con’s arguments persuasive, and we agree with the Board’s conclusion that the FAR 52.228-15 bonding requirements express “a significant or deeply ingrained strand of public procurement policy.”

III

We conclude that K-Con is barred from arguing that the contracts at issue are not construction contracts and that, under the *Christian* doctrine, the standard payment and performance bond requirements in construction contracts were incorporated into K-Con’s contracts by operation of law at the time the contracts were awarded. We have considered the parties’ remaining arguments and find them unpersuasive. We affirm the Board’s decision.

**AFFIRMED**

**COSTS**

No costs.